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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

Nos. ~~1024~~, ~~1026~~ 84-86 and ——

ALABAMA POWER COMPANY, *Petitioner,*

vs.

HAROLD L. ICKES, as Federal Emergency Administrator of Public Works, et al., *Respondents,*

ALABAMA POWER COMPANY, *Petitioner,*

vs.

HAROLD L. ICKES, as Federal Emergency Administrator of Public Works, et al., *Respondents,*

IOWA CITY LIGHT AND POWER COMPANY, *Petitioner,*

vs.

HAROLD L. ICKES, as Federal Emergency Administrator of Public Works, et al., *Respondents,*

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners, Alabama Power Company and Iowa City Light and Power Company, pray that writs of certiorari issue to review the judgment of the United States Court of

Appeals for the District of Columbia in the two cases of *Alabama Power Company* v. *Ickes, et al.*, (Docket Nos. 6580 and 6583), and the case of *Iowa City Light and Power Co.* v. *Ickes, et al.*, (Docket No. 6865), entered on May 10, 1937, affirming the judgment of the District Court of the United States for the District of Columbia.

OPINIONS BELOW.

Neither the opinion of the District Court (R. Vol. I, 437) nor that of the Court of Appeals (R. Vol. II, 1279) has yet been reported.

JURISDICTION.

The judgments of the Court of Appeals were entered May 10, 1937 (R. Vol. II, 1286-7). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

SPECIFICATION OF ERRORS TO BE URGED AND QUESTIONS PRESENTED.

1. Whether the Court of Appeals erred in holding that a public utility cannot question the legality of the action of federal officials who are about to destroy its business by promoting and financing, as Federal Public Works Projects, municipal plants which are intended to and which will duplicate and supplant its facilities and business.

2. Whether the Court of Appeals erred in failing to hold that the Emergency Relief Appropriation Act of 1935 (49 Stat. 115), and Title II of the National Industrial Recovery Act (48 Stat. 200) do not authorize gifts and loans of federal moneys to municipalities for the construction of local electric distribution systems as Federal Public Works Projects, in the circumstances disclosed in this record.

3. Whether the Court of Appeals erred in failing to hold that the Emergency Relief Appropriation Act of 1935 (49

Stat. 115), and Title II of the National Industrial Recovery Act (48 Stat. 200), if construed to authorize gifts and loans of federal moneys to municipalities for the construction of local electric distribution systems as Federal Public Works Projects, in the circumstances disclosed in this record, are unconstitutional, because:

(a) They delegate legislative power to the executive.

(b) The gifts and loans are not authorized by the General Welfare clause of the Constitution or by any other clause thereof.

(c) The gifts and loans will have the necessary effect of extending federal control over and regulating matters reserved to the States or the People by the Tenth Amendment.

(d) The gifts and loans will have the direct and necessary effect of destroying the balance established by the Constitution between the Federal Government and the States.

STATUTES INVOLVED.

The statutes involved are Title II of the National Industrial Recovery Act, printed *infra*, p. 24 and the Emergency Relief Appropriation Act of 1935, printed *infra* p. 32.

STATEMENT.[1]

Petitioner, Alabama Power Company, generates and distributes electricity, wholly within the State of Alabama. (R. Vol. II, 24, 25.) It operates distribution systems in six

[1]The following statement of facts is in accord with the great weight of the evidence. No effort has been made to indicate wherein it is in accord with and wherein it goes beyond the findings of fact of the trial court, for the reason that the Court of Appeals, in reaching its decision, accepted the petitioners' version of the facts, (R. Vol. II, 1279, 1280-1281), without inquiry as to what facts the trial court had or had not found or as to whether its findings or failures to find—as to which error was assigned—were warranted by the record.

towns in northwestern Alabama. In four of these towns petitioner has non-exclusive unexpired franchises. (R. Vol. II, 16-20.) In the other two its franchises expired in 1932, but it still operates there with the towns' consent. (R. Vol. II, 15, 16.) Petitioner is the only agency distributing or presently equipped to distribute electricity in these six towns. (R. Vol. I, 448, R. Vol. II, 20.) Petitioner's properties in the towns have a value of slightly less than $1,000,000. (R. Vol. II, 90.) Its rates are regulated by the Alabama Public Service Commission. (R. Vol. II, 20.)

Petitioner, Iowa City Light and Power Company, generates and distributes electricity wholly within Johnson County, Iowa, serving Iowa City and adjacent territory. (R. Vol. II, 299, 300.) Petitioner's franchise in Iowa City expired in 1934, but petitioner has continued, with the consent of the City government, to supply electricity to the municipality and to private users. (R. Vol. II, 295, 301.) Petitioner's electric plant and distribution system serving Iowa City has a value of about $1,375,000. (R. Vol. II, 301) Its rates are regulated by the City Council. (R. Vol. II, 297.)

The respondent officials of the Federal Emergency Administration of Public Works (PWA) have entered into a contract with each of the six Alabama towns, providing for the construction in it, as a "Federal Public Works Project", of a municipal electric distribution system. These towns will obtain their electricity from the Tennessee Valley Authority. The systems are to be built entirely with federal funds, of which part is to be an outright gift, the remainder being repayable only out of the earnings of the system. (R. Vol. I, 259-278, 297-333, 378-436.) The amounts of the loans and grants to the Alabama towns and the authority under which the Administrator purports to act are given below:

City	*Loan*	*Grant*	*Statute*
Decatur	$250,000	$100,000	Title II, N. I. R. A.
Sheffield	178,000	52,000	" " "
Tuscumbia	100,000	30,000	" " "
Hartselle	33,000	27,000	Emergency Relief Appropriation Act, 1935
Guntersville	48,000	39,272	Emergency Relief Appropriation Act, 1935
Russellville	69,000	56,454	Emergency Relief Appropriation Act, 1935

The contract between the respondents and Iowa City is for a grant only, of $413,000 (45 per cent of the estimated cost of construction) and a power plant is to be built as well as a distribution system. (R., Iowa City, 114-131.) This project is said to derive its authorization from the Emergency Relief Appropriation Act of 1935.

The contracts between PWA and the cities not only provide that the projects shall be known as Federal Public Works Project but cover every detail of the construction work, just as though the work were being done for the United States Government. The plans and specifications must be approved by the Administrator. The method of letting the construction contracts is prescribed; performance bonds and liability insurance are required; the construction contracts must provide for a 30-hour week, minimum wages, employment preferences, collective bargaining, use of human labor in lieu of machinery when possible; the provisions of the "Kick-back" Statute must be incorporated; reports must be made to numerous government bureaus, etc., etc. (R. Vol. I, 262, 264, 266-278.)

If the contemplated projects are carried out, the business of the petitioners in the seven towns will be wholly destroyed. The elimination of the petitioners is essential to the financing of the projects. Sheffield and Tuscumbia will remove the petitioner's distribution systems from the streets as a nuisance as soon as the municipal system is completed, and so represented to the Administrator. (R.

Vol. II, 122, 123.) Iowa City will adopt the same course. (R. Vol. II, 302.) The other towns, in their applications to PWA, said: "The distribution system is intended to practically duplicate and supplant a public utility distribution system . . . The project will not be competitive since practically all of the consumers are signed up for a ten year period." (R. Vol. II, 109, 110, 111, 126-127.) PWA reached the same conclusion, and, in computing the financial soundness of the projects, assumed that the petitioner would be immediately eliminated. (R. Vol. II, 347, 349.)

Construction of the distribution systems will be directly caused by the Administrator. The stated purpose of the Public Works program was to cause construction which would not otherwise take place. PWA officially declared that "the public grants are given to induce public bodies to undertake construction of useful works . . ." (R. Vol. II, 401.) To this end the offer of grants and revenue loans was given wide publicity. (R. Vol. II, 420, 535-6.) And the financial condition of the towns was such that they could not have undertaken these projects save with federal funds. (R. Vol. II, 34, 47, 70, 78.) This situation was general. See *Ashton* v. *Cameron County*, 298 U. S. 513, 533.

Legal Authority of the Administrator. The authority of the Administrator must be found, if at all, in the statutes, printed in the Appendix, *infra*, p. 24, and discussed *infra*, pp. 18 to 22, and in the administrative procedure had thereunder.

The action taken by the President with regard to these projects is contained in documents described on pages 338-361 of Volume II of the Record. It may be summarized as follows: Lists, called "books", of "Non-Federal Projects Which Are Deemed Desirable," were presented by the Administrator to the President. These contained an index giving the location, type of project, and amount of loan and grant of each project. These amounts were totaled at the end of the index. Following the index was a brief description of the construction proposed in each project. At the

end of the index appeared in pencil the letters, "O. K. F. D. R."

Attached to the list including the Iowa City project was a letter from the President to the Secretary of the Treasury (R. Vol. II, 345), and to the list including the projects in Hartselle, Guntersville and Russellville, a letter to the Secretary of the Interior (id. 355) which contained the following (substantially similar in both letters):

> "Pursuant to the Emergency Relief Appropriation Act of 1935, I hereby:
>
> "I. Approve the projects included in the program of public works set forth in the annexed 'Schedule A', as to each of which I find and determine that not less than 25 per centum of the loan or grant, or the aggregate thereof, is to be expended for work under each particular project."

It is agreed on the Record (R. Vol. II, 338-9) that the documents mentioned above represent all the orders and findings of the President, Administrator or any officials having authority to make ultimate determinations in regard to these projects.

The applications of the towns were made to field officers of PWA. They were forwarded with reports to Washington where they were further examined by an Engineering Division, a Finance Division, a Legal Division, and, for a time, by an Electric Power Board of Review, later by a Power Division. From time to time a list was made of those projects which were approved by the divisions mentioned. This list was then submitted to the Administrator and for a time to an advisory body known as the Special Board for Public Works. The list was then presented to the President for his approval as stated above. (R. Vol. II, 314, 315.)

The Petitioners subpoenaed the reports or recommendations of the Examining Divisions in order to establish that criteria for approval of projects not authorized by the stat-

utes were employed, but, with the exception of one report voluntarily produced (R. Vol. II, 346), the trial judge ruled that they were immaterial and need not be produced. (R. Vol. II, 350-1.)

However, the evidence in the record establishes that the standard or criterion applied in approving these projects was not the relief of unemployment—in fact, there is no evidence that there was any contemporaneous investigation or finding as to any effect of these projects upon unemployment—but was, in the Alabama cases, the furnishing of a market for T. V. A. power, and, in all cases, the establishment of yardsticks to measure and reduce rates for electric energy produced and sold wholly within a state.

The list submitted by the Administrator to and approved by the President containing the Decatur project, the largest of the six, recited that the project was recommended "for the reason, among others, that the Tennessee Valley Authority has acquired the necessary transmission lines to serve said distribution system and the financing of said project will aid said Authority in obtaining a market for its electrical energy." (R. Vol. II, 343-4.) The original contracts between the Administrator and the towns (since cancelled) conditioned the loans and grants upon the towns making contracts with T. V. A. to take its power and to charge rates prescribed by it. (R. Vol. II, 20-21.) Although all the applications were made between August 30, 1933 (R. Vol. II, 120), and December 20, 1933 (Vol. I, 454-457; R. Vol. II, 115, 120, 156), and the first approvals by the President were in November, 1933 (id. 339), no contracts with the towns were made until December 6, 1934, and no steps to advance funds were taken until just prior to the institution of these suits in July, 1935. This delay was occasioned, and it was so stated by the Administrator, by negotiations undertaken by T. V. A. to acquire the Company's distribution systems in the towns. (R. Vol. II, 136-139, 142-3, 476.)

The Electric Power Board of Review (a division in the Public Works Administration) which reviewed and approved these projects considered principally "social desirability", in accordance with rules prescribed by the President. (R. Vol. II, 373.) Its members "did not place a great deal of importance on employment as bearing on social desirability. Primarily, the employment was more or less limited on municipal (electric) projects as compared with a great many of the others, and the class of employment was too technical to become selected from the local unemployment situation. The people who had to be employed on a municipal electric project were such skilled labor that they could not be found in most communities. The number of people employed on those projects as a type was considerably less than on other projects. The board found the principal element of social desirability in municipal electric projects in the difference in the cost of service to the consumers. If the cost of service to the consumers was lower from the project than they were obtaining under the existing conditions, it was considered very desirable from a social standpoint. That means, if the rates suggested in the application were lower than the existing rates." (R. Vol. II, 252.)

In his testimony in this case the Administrator said much the same thing. (R. Vol. II, 516.)

> "Dealing specifically with an application for a duplicating and competing municipal power project, there might be several elements of social desirability which governed the action and decision of PWA. You might put the municipality in the position of being able to supply current to its citizens at a lower rate. It certainly gave employment in constructing and in operating the plant, and it might have the effect of removing from the municipality the heavy, and in some cases the corrupting, hand of a public utility. All those were criteria which were proper to be considered by PWA in determining the social desirability of an application for a loan and grant for competing municipal

projects. I think, in a general way, they were considered."

Proceedings below. Petitioners filed these bills in the United States District Court for the District of Columbia to enjoin the respondents from making the allotments under the contracts between PWA and the seven towns, or from paying to these towns any funds whatsoever for the construction of electric systems. These causes were selected by counsel from more than forty similar cases for trial upon the facts. After such trial the trial judge dismissed each of the bills upon the merits, holding that the petitioners had a standing to present and have adjudicated the question of the legal authority for the threatened acts of the respondents but that their acts were authorized by statute and that the statutes so construed were constitutional. (R. Vol. I 472.) The Court of Appeals affirmed, without inquiring into the legal authority for the threatened acts, on the ground that the petitioners had no standing to question their validity.

The majority of the Court of Appeals held that the petitioners were without standing to question the legal authority for the Administrator's acts, because, they said, the thing which will affect the petitioners is the competition of the municipal plants and that is lawful. As is pointed out below, it is not competition which affects the petitioners but their elimination and the supplanting of their facilities—in three of the towns by order to remove their facilities, and in the others by the action of the towns in securing all their customers for ten years by contract in order to assure the Administrator that the revenue loans will be repaid. But, however that may be, the opinion of the Court is apparently based upon the legal proposition that no one, no matter how seriously injured, can question the legal authority of a public official whose acts cause the injury, provided its impact upon the plaintiff comes from the intervening legal act of a third party. Such damage,

the Court says, is *damnum absque injuria*, not merely as against the person acting lawfully, but also as against the official acting, according to the plaintiff, unlawfully. Therefore, the legality of the official's conduct cannot be examined.

REASONS FOR GRANTING THE WRITS.

In *Duke Power Company* v. *Greenwood County*, 298 U. S. 651, this Court granted certiorari to review the decision of the Fourth Circuit Court of Appeals in a suit brought by a public utility company to enjoin a similar loan and grant by the Administrator, allegedly under Title II of the National Industrial Recovery Act. The Circuit Court of Appeals had held there, as here, that the petitioner had no standing to question the legality of the Administrator's acts, but went on, nevertheless to consider that question and to decide, as did the trial court in these cases, in favor of the legality of the action threatened. In fact, the *Duke Power Company* case was the principal authority relied upon by both courts in these cases, the trial court, however, rejecting its conclusion as to the petitioners' standing to raise the constitutional and statutory questions. The *Duke* case, if it had been decided on the merits, by this Court, would have disposed of these cases, but it was sent back, *per curiam*, for a new trial because of irregularities in practice appearing on the record, 299 U. S. 259. The questions which it presented still remain undecided by this Court.

In the petition for certiorari in the *Duke Power Company* case, filed April 17, 1936, this Court was told that there were pending in the lower federal courts approximately thirty other suits involving federal loans and grants for power projects. Petition, p. 23. On February 27, 1937, the Assistant Administrator of PWA reported to the Senate that there were at that time 53 such suits pending against the Administrator. (75th Congress, 1st Session, Senate Document No. 27.) Approximately the same number of suits are pending at the present time. These suits

effect public utilities all over the United States, and it is of the greatest importance to these utilities and their stockholders that the questions presented in these cases be authoritatively and finally determined by this Court.

While the propriety of granting certiorari to determine these questions is thus clear, the following statement of reasons is made for the convenience of this Court:

1. The Court of Appeals in holding that petitioners have no cause of action against the Administrator for injunctive relief, even though the statute under which he purports to act be unconstitutional or his acts unauthorized by law and even though the destruction of their businesses will necessarily result from and is contemplated by the projects which he has authorized and which he will finance, has decided a question which is both one of general importance and one relating to the application of the Constitution and laws of the United States which has not been but should be decided by this Court.

In *Frothingham* v. *Mellon*, 262 U. S. 447, 488, this Court said that the legality of expenditures of federal funds might be questioned by a party

> "able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."

In the present case the Administrator has authorized, for purposes which he claims are authorized by law, the construction, as Federal Public Works Projects, with funds which he will advance and in a manner which he prescribes, of facilities which are intended to supplant the petitioners', and which must do so if the loans contemplated are to be repaid. It is this action of his, in causing the construction for alleged federal purposes and with federal funds, which threatens the petitioners' business with destruction. Every citizen has a right to be free from unlawful and unauthor-

ized action of public officials which contemplates and must result in the destruction of his particular property. Every official owes a duty to refrain from such illegal and injurious actions. If he fails to observe that duty the courts are open to the citizen to prevent the wrong. The dissenting Circuit Judge in the *Duke Power Company* case stated the proper application of the *Frothingham* case in this way:

> "The power company has such an interest in the business as to justify its suit. The practical effect upon its valuable property interests is manifest. It has an interest far more weighty than that of a federal taxpayer, which in *Frothingham* v. *Mellon*, 262 U. S. 447, was held to be too remote, uncertain, and insignificant to entitle him to injunctive relief against an invalid federal appropriation. The plaintiffs here conform to the rule laid down in that case since they show not only that the act of the administrator was invalid, but that they are in danger of sustaining a direct and substantial injury therefrom." *Greenwood County* v. *Duke Power Company*, 81 F. (2d) 986, 1001, 1002.

The fact that the impact of the injury upon the petitioners will be produced by the action of the towns—in three cases by ordering the removal of petitioners' facilities, and in the other three by causing such removal because all of its customers have been bound by contract to the proposed plants for ten years—does not render the Administrator immune from petitioners' suit. The fact remains that he is the proximate and moving cause of the injury which they will suffer solely because of his unlawful acts in authorizing and financing with gifts and revenue loans, the repayment of which contemplates and requires the total elimination of petitioner from the towns, these particular Federal Public Works projects. It is well settled that where one without warrant or justification in law, induces and enables another to inflict injury on a third party, the wrongdoer is liable even though the intervening party may act within his legal rights. *Hitchman Coal & Coke Company* v. *Mitchell*,

245 U. S. 229, 251-252; *Tasker* v. *Stanley*, 153 Mass. 148; *Deon* v. *Kirby Lumber Co.*, 162 La. 671; *U. S. Fidelity & G. Co.* v. *Millonas*, 206 Ala. 147; *Gibson* v. *Fidelity and Casualty Co.*, 232 Ill. 49; *Rice* v. *Manley*, 66 N. Y. 82; *Benton* v. *Pratt*, 2 Wend. 386; compare *Angle* v. *Chicago, St. Paul M. & O. R. Co.*, 151 U. S. 1, 12-13, 22, 23.

The Administrator argued in the Court of Appeals and also in the *Duke Power Company* case—and the Court of Appeals seems to adopt the argument—that what the petitioners really complain of is future competition which will result from the operation of the Federal Public Works projects authorized and financed by the Administrator; that the operation of these plants by the towns will be lawful; and that, therefore, the petitioners cannot complain that the operation was brought about by acts of the Administrator, a public official, even though these acts are without authority or justification in law. It is said that the public official owes no duty to the petitioners not to cause this injury to them. This argument is unsound both in its premise and its conclusion. It involves a most fundamental question of law, vital to the protection of the constitutional rights of citizens which this Court should decide.

In the first place, the short answer to the argument has already been given. It is not competition by the towns which threatens petitioners' businesses. It is total elimination. Three of the towns will upon the completion of the projects order the removal of petitioner's facilities from their limits. The other three have already secured all petitioners' costomers by ten-year contracts. There will be no competition in the six towns. The Federal Public Works projects will be there alone.

Moreover, it is not the law that even if petitioners were permitted to remain to secure some crumbs of business they could not challenge the legality of the Administrator's acts in authorizing and financing the construction of plants in such a way as to insure and require irreparable injury to them. The Administrator's argument rests upon the

assertion that because the petitioners cannot complain of competing operation by the towns, no one including the Administrator owes them any duty to refrain from unlawful conduct which directly causes such operation. This is not the law.

Even though operation by the towns were lawful, both the towns and persons contracting with them could still be enjoined by the petitioners from violating any law in the construction or the financing of the plants. *City of Campbell* v. *Arkansas-Missouri Power Co.*, 55 F. (2d) 560; *Oklahoma Utilities Co.* v. *City of Hominy*, 2 F. Supp. 849; *Iowa Southern Utilities Co.* v. *Cassill*, 69 F. (2d) 703; *Gallardo* v. *Porto Rico Ry. L. & P Co.*, 18 F. (2d) 918; *Colorado Central Power Co.* v. *Municipal Power Development Co.*, 1 F. Supp. 961; *Mississippi Power Co.* v. *City of Starkville*, 4 F. Supp. 833; *Arkansas-Missouri Power Co.* v. *City of Kennett*, 78 F. (2d) 911; *Kansas G. & E. Co.* v. *City of Independence*, 79 F. (2d) 32. Thus the argument that the petitioners have no standing to complain if the operation of the plants by towns is lawful falls to the ground. The petitioners can complain, regardless of the lawfulness of the operation, if the acts which cause it are in violation of law. The Administrator owes the petitioners a duty not to cause petitioners injury by acts done beyond and without authority in law. If he breaches that duty, it avails him nothing that the impact of the injury comes from operation of the plants by third parties which may be lawful. It is the unlawfulness of his acts and not of the towns' acts of which petitioners complain. This doctrine has long been applied in such cases as have arisen—and they are necessarily few—where a defendant unlawfully injures a plaintiff through the competition of a third person. *Citizens Electric Illuminating Co.* v. *Lackawanna Etc. Co.*, 225 Pa. 145; *Tuttle* v. *Buck*, 107 Minn. 145. This is not a suit to enjoin competition by the towns. They will be as free after as before any decree entered herein to engage in it. This is

a suit to enjoin the unlawful acts of the Administrator which cause the injury to petitioners and which breach the duty which he owes them.

Railroad Co. v. *Ellerman,* 105 U. S. 166, cited by the Court of Appeals, has no bearing upon this question. That was a suit by Ellerman, the operator of a wharf to enjoin the lessee of the Railroad Company from operating a wharf in competition with him. The Railroad was a corporation, the powers of which included that of acquiring and using wharves for *railroad purposes.* Ellerman's claim, this Court said, came down to the contention that the defendant's operation of the wharf infringed Ellerman's rights because the lease was beyond the corporate powers of the Railroad Company. But, this Court answered, only a stockholder or the State could raise the question of *ultra vires* under these circumstances; Ellerman had no interest in it. The corporation owed him no duty which it had not performed. The case is only one of many which hold that only the State, stockholders and, in some instances, creditors may question the violation of powers contained in a corporate charter. It has no applicability here. The petitioners here have a right—and the respondent owes a corresponding duty—that their businesses shall not be destroyed by unlawful acts of the respondent in authorizing and financing Public Works projects intended to eliminate and supersede their facilities.

It is obviously beside the point to discuss cases like *United States* v. *Dern,* 63 App. D. C. 28, 68 F. (2d) 773, where the consequences to the plaintiff of the conduct complained of were indirect and remote. To argue that the petitioners' injury comes from the action of the towns and is the consequential and indirect result only of the Administrator's acts, is to ask this Court to forget Justice Field's admonition in *Ho Ah Kow* v. *Nunan,* 12 Fed. Cas. No. 6,546, at 255:

> ". . . we cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness,

and forbidden to know as judges what we see as men . . ."

It is the subsidized construction of these plants as Federal Public Works projects which destroys the petitioners' property. Without this unwarranted and unlawful interference, they would never be threatened with the necessity of removing and scrapping their facilities because of the wasteful and subsidized duplication of the systems. The apparent result of the Court of Appeals decision is that although the petitioners might challenge the legal authority of the Administrator if he should attempt to construct these Federal Public Works projects directly (compare, *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288), they may not challenge it if he authorizes the towns to construct them for the same purposes, with the same funds, and with the same injury to the petitioners. Such a result, we submit, is hardly consistent with the orderly administration of government or the adequate protection of constitutional or legal rights. The result is to create an area in which a government official can destroy the property of other persons with impunity, regardless of the legality or constitutionality of his act. This startling situation arises because the injured parties are denied a right to come into court to test the substantive question. A constitutional right without a remedy to enforce it is nugatory. The Administrator, by acting through the municipalities, will have placed himself beyond the reach of the law and above the Constitution. Clearly at a time when federal funds are used increasingly throug' local governments, government owned corporations, and other agencies to finance projects which directly impinge upon the businesses of citizens, this Court should determine whether or not a citizen specially injured by such a threatened expenditure can question the authority of the federal official authorizing and directing it.

2. These cases present the important question, not hitherto decided by this Court, whether the Emergency Re-

lief Appropriation Act of 1935, in its application as disclosed in this record, and Title II of the National Industrial Recovery Act, to the extent, if any, that it is made applicable to the facts here disclosed by Section 12 of the former Act, constitute an unconstitutional delegation of legislative power from the Congress to the President, within the principles enunciated by this Court in *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, and *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495.

The relief appropriation of 1935 provides that "in order to provide relief, work relief and to increase employment by providing for useful projects, there is hereby appropriated . . . to be used in the discretion and under the direction of the President" four billion, eight hundred and eighty million dollars. It is further provided that, except as the President may use any or all of this amount for direct relief (p. 33, *infra*) or for financing the purchase of farm lands by farmer, tenants or laborers (p. 35, *infra*) or for the administration of the Agricultural Adjustment Act, (p. 35, *infra*), the appropriation shall be available for a list of classes of projects in amounts not exceeding specified sums. One such item is:

> "(g) loans or grants, or both, for projects of States, Territories, Possessions, including subdivisions and agencies thereof, municipalities and the District of Columbia, and self-liquidating projects of public bodies thereof, where, in the determination of the President, not less than twenty-five per centum of the loan or the grant, or the aggregate thereof, is to be expended for work under each particular project, $900,000,000."

Under authority sought to be given him in the act, the President increased the amount named from $900,000,000 to $1,700,000,000, p. 41, *infra.*

The President's power to make loans and grants under Title II of NIRA was limited by section 201 (d) to June 16, 1935. Any further authority under that Act must come

from Section 12 of the 1935 Act. That section is obscure but its proper interpretation seems to be that the power of the *President* to make grants under the earlier Act was not extended and that his power to make loans was limited to the proceeds of the revolving fund created by the sale of obligations of borrowers. The proposed loans to Sheffield and Tuscumbia are not from this fund but from earmarked allotments of the original appropriation.

However this may be, Title II appropriated three billion dollars. The Administrator was directed to "prepare a comprehensive program of public works, which shall include among other things," "(c) any projects of the character heretofore constructed or carried on either directly by public authority or with public aid to serve the interests of the general public." "With a view to increasing employment quickly" the President was authorized to construct or finance any Public Works project included in the comprehensive program and to make a gift to any State or public body not exceeding 30% of the cost of labor and materials.

No comprehensive program was ever prepared. The only program of any sort was the several lists presented to the President, *supra* p. 6, authorizing projects. R. Vol. II, 514-15.

It is plain that under these two acts the President was given a total of just under eight billion dollars, with no guide whatever as to what he should do with it except to spend it. The words in NIRA, "with a view to increasing employment quickly", are a mere repetition of the expression, "to reduce and relieve unemployment", contained in Declaration of Policy, which this Court described in the *Schechter* case, *supra* (p. 537) as "such a preface of generalities as to permissible aims as we find in section 1 of Title I."

It is at once apparent that if the principles announced by this Court in the *Panama* and *Schechter* cases, which declared unconstitutional Title I of NIRA, are applied to Title II of the same act and to the Emergency Relief Ap-

propriation Act of 1935, these acts also are invalid. The Court of Appeals for the District of Columbia in *Township of Franklin* v. *Tugwell*, 85 F. (2nd) 208, held that these principles were applicable and that the provisions of Section 1 of the Act of 1935 there involved were unconstitutional. The Circuit Court of Appeals for the Sixth Circuit indicated, without deciding, that it held the same view of Title II of NIRA, in *United States* v. *Certain Lands in Louisville*, 78 F. (2nd) 684, 685. Certiorari was granted to review the decision in this case (296 U. S. 567), but dismissed upon motion of the petitioner, the Government (297 U. S. 726).

In other recent cases the question of the extent to which Congress may delegate its power to determine how, when, for what purposes and upon what objects funds of the Government shall be spent has been brought before this Court. The question was briefed and argued in the *Duke Power Company case, supra,* and in *United States* v. *Butler*, 297 U. S. 1. But in neither case did this Court find it necessary to decide the question.

This question was touched upon but not decided by this Court in *Cincinnati Soap Company* v. *United States*, U. S. Sup. Ct., May 3, 1937. That case involved a payment of Federal funds to the Philippine Islands. There was no attempt to indicate how the government of the Islands was to use the funds, but this Court upheld the payment in view of the Islands' semi-independent status. It can hardly be doubted that if the President or the Administrator had stood in the place of the Philippine Islands the act would have been unconstitutional. It is unnecessary to argue the transcendent importance of the question of delegation of power to determine the use of federal funds, or the propriety of its review by this Court.

The question is squarely presented by the record in these cases. These statutes, in both the size of the sums appropriated and their astounding vagueness as to where, when, how, and for what the moneys are to be used are utterly un-

like anything heretofore known. Eight billion dollars was to be spent on any conceivable project which the President and his advisors might choose, except the construction of naval vessels in excess of the London Naval Treaty of 1930. Nor did the term "projects of States" and municipalities provide any guide as to what should be done through these agencies. Such projects may include everything from trimming shrubbery, tick eradication and indexing books (See Monthly Report of Federal Emergency Relief Administration, December 31, 1933, reporting on Expenditures of PWA funds, page 18) to the whole gamut of business and industry. For instance, States and their political subdivisions have owned and operated gasoline filling stations, *Standard Oil Company* v. *City of Lincoln*, 275 U. S. 504; ice plants, *City of Denton* v. *Denton Home Ice Co.*, 27 S. W. (2d) 119 (Tex.); railroads, *United States* v. *California*, 297 U. S. 175; liquor stores, *South Carolina* v. *United States*, 199 U. S. 437; warehouses, grain elevators, flour mills, real estate developments, and banks, *Green* v. *Frazier*, 253 U. S. 233; coal, wood and fuel yards, *Jones* v. *Portland*, 245 U. S. 217. The situation is summed up in a report sent by the President to Congress with his message of February 3, 1937:

> "The definition of public works has been expanded. Public work now includes the collection of basic data, mapping and preparation of plans. The term also covers a variety of services such as forestry, pest control, soil conservation, housing and rural electrification.
> "The list has been further expanded in the efforts of the Works Progress Administration to provide useful work for persons on relief *in accordance with principles established by the President.*" (Italics ours.)

There could be no plainer statement that the President was free to spend these vast sums as he, in his discretion, thought best and that any guiding principles which were

given his agents were evolved by him and not by the Congress.

Furthermore, even if it be argued that the words "with a view to increasing employment quickly" furnished some guide to the Executive, the record here discloses that there was no administrative procedure, by way of findings or otherwise, to show that the so-called standard or guide was followed in these cases, that these projects had any bearing upon the relief of unemployment, or even that any unemployment existed in the areas here involved, or in the industries which would furnish the materials for the projects. It does not even appear that any investigation was ever made on this subject. Clearly neither the Congress, nor the Comptroller General, nor the people of the United States can ever tell whether or not the money has been spent as provided by law. For the so-called law lays down no guide, and the President has made no record of the considerations which moved him to make the expenditure.

3. These cases present the important question, not hitherto decided by this Court, whether the General Welfare clause of the Constitution, in view of the limitation upon the federal spending power contained in the Tenth Amendment and in the dual sovereignty of the States and the Federal Government authorizes the Federal Government to give and lend its funds to municipalities for the construction of local electric distribution systems which are to be destructive of existing privately owned systems.

While this Court has held that expenditures to relieve unemployment are for the general welfare, *Steward Machine Co.* v. *Davis,* U. S. Sup. Ct., May 24, 1937, it has also stated that "the line must still be drawn between one welfare and another, between particular and general," *Helvering* v. *Davis,* U. S. Sup. Ct., May 24, 1937. The present cases present the question, not whether the expenditures fall within "a penumbra where discretion is at large," but whether an expenditure for an object admittedly local and particular can become general or national because of pos-

sible remote or collateral results not supported by administrative findings of fact. It is well settled that the collateral or consequential results of expenditures will not save their legality if the immediate object is unauthorized. Compare *Loan Association* v. *Topeka*, 20 Wall. 655; *Parkersburg* v. *Brown*, 106 U. S. 487; *Cole* v. *LaGrange*, 113 U. S. 1; *Madisonville Traction Co.* v. *St. Bernard Mining Co.*, 196 U. S. 239, 251-252; *Dodge* v. *Mission* Tp., 107 Fed. 827, 830; *Lowell* v. *Boston*, 111 Mass. 454, 461; *Miles Planting Co.* v. *Carlisle*, 5 App. D. C. 138, 158. All the more is this true here where the immediate object of the expenditure is not merely unauthorized, but is the performance of a state function, the creation of local publicly operated utilities as yardsticks for the regulation of local electricity rates.

In its memorandum replying to the petition for certiorari in the Duke case the Government agreed that the question of validity of the loan and grant, if properly presented, was of public importance meriting review by this Court.

For these reasons, it is respectfully submitted that the petitions for certiorari should be granted.

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APPENDIX.

I.

NATIONAL INDUSTRIAL RECOVERY ACT:

[PUBLIC—No. 67—73d CONGRESS]

AN ACT

To encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—INDUSTRIAL RECOVERY

DECLARATION OF POLICY

SECTION 1. A national emergency productive of widespread unemployment and disorganization of industry, which burdens interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people, is hereby declared to exist. It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources.

* * * * *

TITLE II—PUBLIC WORKS AND CONSTRUCTION PROJECTS

FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS

SECTION 201. (a) To effectuate the purposes of this title, the President is hereby authorized to create a Federal

Emergency Administration of Public Works, all the powers of which shall be exercised by a Federal Emergency Administrator of Public Works (hereafter referred to as the "Administrator"), and to establish such agencies, to accept and utilize such voluntary and uncompensated services, to appoint, without regard to the civil service laws, such officers and employees, and to utilize such Federal officers and employees, and, with the consent of the State, such State and local officers and employees as he may find necessary, to prescribe their authorities, duties, responsibilities, and tenure, and, without regard to the Classification Act of 1923, as amended, to fix the compensation of any officers and employees so appointed. The President may delegate any of his functions and powers under this title to such officers, agents, and employees as he may designate or appoint.

(b) The Administrator may, without regard to the civil service laws or the Classification Act of 1923, as amended, appoint and fix the compensation of such experts and such other officers and employees as are necessary to carry out the provisions of this title; and may make such expenditures (including expenditures for personal services and rent at the seat of government and elsewhere, for law books and books of reference, and for paper, printing and binding) as are necessary to carry out the provisions of this title.

(c) All such compensation, expenses, and allowances shall be paid out of funds made available by this Act.

(d) After the expiration of two years after the date of the enactment of this Act, or sooner if the President shall by proclamation or the Congress shall by joint resolution declare that the emergency recognized by section 1 has ended, the President shall not make any further loans or grants or enter upon any new construction under this title, and any agencies established hereunder shall cease to exist and any of their remaining functions shall be transferred to such departments of the Government as the President shall designate: *Provided,* That he may issue funds to a borrower under this title prior to January 23, 1939, under the terms of any agreement, or any commitment to bid upon or purchase bonds, entered into with such borrower prior to the date of termination, under this section, of the power of the President to make loans.

SEC. 202. The Administrator, under the direction of the President, shall prepare a comprehensive program of public works, which shall include among other things the following: (a) Construction, repair, and improvement of public highways and park ways, public buildings; and any publicly owned instrumentalities and facilities; (b) conservation and development of natural resources, including control, utilization, and purification of waters, prevention of soil or coastal erosion, development of water power, transmission of electrical energy, and construction of river and harbor improvements and flood control and also the construction of any river or drainage improvement required to perform or satisfy any obligation incurred by the United States through a treaty with a foreign Government heretofore ratified and to restore or develop for the use of any State or its citizens water taken from or denied to them by performance on the part of the United States of treaty obligations heretofore assumed; *Provided,* That no river or harbor improvements shall be carried out unless they shall have heretofore or hereafter been adopted by the Congress or are recommended by the Chief of Engineers of the United States Army; (c) any projects of the character heretofore constructed or carried on either directly by public authority or with public aid to serve the interests of the general public; (d) construction, reconstruction, alteration, or repair under public regulation or control of low-cost housing and slum-clearance projects; (e) any project (other than those included in the foregoing classes) of any character heretofore eligible for loans under subsection (a) of section 201 of the Emergency Relief and Construction Act of 1932, as amended, and paragraph (3) of such subsection (a) shall for such purposes be held to include loans for the construction or completion of hospitals the operation of which is partly financed from public funds, and of reservoirs and pumping plants and for the construction of dry docks; and if in the opinion of the President it seems desirable, the construction of naval vessels within the terms and/or the limits established by the London Naval Treaty of 1930 and of aircraft required therefor and construction of heavier-than-air aircraft and technical construction for the Army Air Corps and such Army housing projects as the President may approve, and provision of original equipment for the mechanization or motorization of such Army

tactical units as he may designate: *Provided, however,* That in the event of an international agreement for the further limitation of armament to which the United States is signatory, the President is hereby authorized and empowered to suspend, in whole or in part, any such naval or military construction or mechanization and motorization of Army units; *Provided further,* That this title shall not be applicable to public works under the jurisdiction or control of the Architect of the Capitol or of any commission or committee for which such architect is the contracting and/or executive officer.

SEC. 203. (a) With a view to increasing employment quickly (while reasonably securing any loans made by the United States) the President is authorized and empowered, through the Administrator or through such other agencies as he may designate or create, (1) to construct, finance, or aid in the construction or financing of any public-works project included in the program prepared pursuant to section 202; (2) upon such terms as the President shall prescribe, to make grant to States, municipalities, or other public bodies for the construction, repair, or improvement of any such project, but no such grant shall be in excess of 30 per centum of the cost of the labor and materials employed upon such project; (3) to acquire by purchase, or by exercise of the power of eminent domain, any real or personal property in connection with the construction of any such project, and to sell any security acquired or any property so constructed or acquired or to lease any such property with or without the privilege of purchase; *Provided,* That all moneys received from any such sale or lease or the repayment of any loan shall be used to retire obligations issued pursuant to section 209 of this Act, in addition to any other moneys required to be used for such purpose; (4) to aid in the financing of such railroad maintenance and equipment as may be approved by the Interstate Commerce Commission as desirable for the improvement of transportation facilities; and (5) to advance, upon request of the Commission having jurisdiction of the project, the unappropriated balance of the sum authorized for carrying out the provisions of the Act entitled "An Act to provide for the construction and equipment of an annex to the Library of Congress", approved June 13, 1930 (46 Stat. 583); such advance to be expended under the direction of such Commission and in accordance with such Act; *Provided,* That in

deciding to extend any aid or grant hereunder to any State, county, or municipality the President may consider whether action is in process or in good faith assured therein reasonably designed to bring the ordinary current expenditures thereof within the prudently estimated revenues thereof. The provisions of this section and section 202 shall extend to public works in the several States, Hawaii, Alaska, the District of Columbia, Puerto Rico, the Canal Zone, and the Virgin Islands.

* * * *

(d) The President, in his discretion, and under such terms as he may prescribe, may extend any of the benefits of this title to any State, county, or municipality notwithstanding any constitutional or legal restriction or limitation on the right or power of such State, county, or municipality to borrow money or incur indebtedness.

* * * *

SEC. 206. All contracts let for construction projects and all loans and grants pursuant to this title shall contain such provisions as are necessary to insure (1) that no convict labor shall be employed on any such project; (2) that (except in executive, administrative, and supervisory positions), so far as practicable and feasible, no individual directly employed on any such project shall be permitted to work more than thirty hours in any one week; (3) that all employees shall be paid just and reasonable wages which shall be compensation sufficient to provide, for the hours of labor as limited, a standard of living in decency and comfort; (4) that in the employment of labor in connection with any such project, preference shall be given, where they are qualified, to ex-service men with dependents, and then in the following order: (A) To citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of the political subdivision and/or county in which the work is to be performed, and (B) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of the State, Territory, or district in which the work is to be performed; *Provided*, That these preferences shall apply only where such labor is available and qualified to perform the work to which the employment relates; and (5) that the maximum of human labor shall be

used in lieu of machinery wherever practicable and consistent with sound economy and public advantage.

* * * *

ISSUE OF SECURITIES AND SINKING FUND

SEC. 210. (a) The Secretary of the Treasury is authorized to borrow, from time to time, under the Second Liberty Bond Act, as amended, such amounts as may be necessary to meet the expenditures authorized by this Act, or to refund any obligations previously issued under this section, and to issue therefor bonds, notes, certificates of indebtedness, or Treasury bills of the United States.

* * * *

APPROPRIATION

SEC. 220. For the purposes of this Act, there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $3,300,000,000.

II.

EXECUTIVE ORDER OF THE PRESIDENT, JULY 8, 1933

ADMINISTRATION OF PUBLIC WORKS

Pursuant to the authority of "AN ACT To encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works, and for other purposes", approved June 16, 1933, and in order to effectuate title II—Public Works and Construction Projects—thereof;

I hereby appoint Harold L. Ickes to exercise the office of Federal Emergency Administrator of Public Works.

FRANKLIN D. ROOSEVELT.

The White House
July 8, 1933.

III.

EXECUTIVE ORDER OF THE PRESIDENT, AUG. 19, 1933

FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS

A. DELEGATION OF FUNCTIONS AND POWERS.

Pursuant to the authority vested in me by section 201 (a) of the National Industrial Recovery Act, approved June 16, 1933, I hereby delegate to the Federal Emergency Administrator of Public Works the following functions and powers:

1. To establish such agencies, to accept and utilize such voluntary and uncompensated services, and to utilize such Federal officers and employees and, with the consent of the State, such State and local officers and employees as he may find necessary, and to prescribe their authorities, duties, responsibilities, and tenure.

2. Under the conditions prescribed in section 203 of said Act, to construct, finance, or aid in the construction or financing of any public works project included in the program prepared pursuant to section 202 of said Act; upon such terms as he shall prescribe, to make grants to States, municipalities, or other public bodies for the construction, repair, or improvement of any such project; to acquire by purchase, or by exercise of the power of eminent domain, any real or personal property in connection with the construction of any such project and to lease any such property with or without the privilege of purchase; and to aid in the financing of such railroad maintenance and equipment as may be approved by the Interstate Commerce Commission as desirable for the improvement of transportation facilities.

3. In deciding to extend any aid or grant to any State, county, or municipality, to consider whether action is in process or in good faith assured therein reasonably designed to bring the ordinary current expenditures thereof within the prudently estimated revenues thereof.

4. In his discretion, and under such terms as he may prescribe, to extend any of the benefits of Title II of said Act to any State, county, or municipality notwithstanding any constitutional or legal restriction or limitation on the right or power of such State, county, or municipality to borrow money or incur indebtedness.

B. REGULATIONS.

Pursuant to the authority vested in me by section 209 of the National Industrial Recovery Act I hereby prescribe the following rules and regulations as necessary to carry out the purposes of Title II of said Act:

1. No convict labor shall be employed on any project constructed in whole or in part under the provisions of Title II of said Act. No materials manufactured or produced by convict labor shall be used on any such project.

2. No contractor or sub-contractor on any such project who is subject to a code adopted pursuant to Title I of said Act shall permit any employee to work in excess of the hours of labor prescribed in said code. No other contractor or sub-contractor shall permit any employee to work more than 30 hours in any one week, except by authority of the Administrator; *provided* that working time lost in any week because of inclement weather or unavoidable delay may be worked within the succeeding 20 days; *provided further,* that in localities where a sufficient amount of labor is unavailable in the immediate vicinity of the project a maximum of 130 hours of labor in any calendar month may be authorized by the Administrator; *provided further,* that in localities so remote and inaccessible that employees must be housed in camps the Administrator may authorize labor not to exceed 8 hours in any one day and 40 hours in any one week.

3. No employee on any such project shall be paid less than a just and reasonable wage which shall be compensation sufficient to provide for the hours of labor as limited, a standard of living in decency and comfort. All such wages shall be paid in lawful money of the United States, in the full amount earned by each individual at the time of payment, not less often than once each week, and without deduction on account of goods purchased, rent, or other obligations which obligations shall be subject to collection only by legal process.

4. Each contractor or sub-contractor on any such project shall post in a prominent and easily accessible place at the site of the work a legible statement of all wage rates paid.

5. Should it appear that any individual employed on any such project has been or is being paid less than hereinbefore prescribed, the Administrator shall notify the employer of such individual to pay him all wages due accord-

ing to the prescribed rate. Upon 10 days default on the part of such employer he shall be liable to the penalties provided in said Act for violation of these regulations.

6. Any violation of these rules and regulations may be notified by the Administrator to the District Attorney of the appropriate district, who will proceed, if so directed by the Attorney General, to bring a criminal action for such violation.

FRANKLIN D. ROOSEVELT.

The White House,
August 19, 1933.

IV.

EMERGENCY RELIEF APPROPRIATION ACT OF 1935.

[PUBLIC RESOLUTION—No. 11—74TH CONGRESS]

[H. J. Res. 117]

JOINT RESOLUTION

Making appropriations for relief purposes.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That in order to provide relief, work relief and to increase employment by providing for useful projects, there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to be used in the discretion and under the direction of the President, to be immediately available and to remain available until June 30, 1937, the sum of $4,000,000,000, together with the separate funds established for particular areas by proclamation of the President pursuant to section 15 (f) of the Agricultural Adjustment Act (but any amounts thereof shall be available for use only for the area for which the fund was established); not exceeding $500,000,000 in the aggregate of any savings or unexpended balances in funds of the Reconstruction Finance Corporation; and not exceeding a total of $380,000,000 of such unexpended balances as the President may determine are not required for the purposes for which authorized, of the following appropriation, namely: The appropriation of $3,300,000,000 for national industrial recovery contained in the Fourth Deficiency Act, fiscal year 1933, approved June 16, 1933 (48 Stat. 974); the appropriation of $950,000,000

for emergency relief and civil works contained in the Act approved February 15, 1934 (48 Stat. 351); the appropriation of $899,675,000 for emergency relief and public works, and the appropriation of $525,000,000 to meet the emergency and necessity for relief in stricken agricultural areas, contained in the Emergency Appropriation Act, fiscal year 1935, approved June 19, 1934 (48 Stat. 1055); and any remainder of the unobligated moneys referred to in section 4 of the Act approved March 31, 1933 (48 Stat. 22); *Provided*, That except as to such part of the appropriation made herein as the President may deem necessary for continuing relief as authorized under the Federal Emergency Relief Act of 1933, as amended, or for restoring to the Federal Emergency Administration of Public Works any sums which after December 28, 1934, were, by order of the President impounded or transferred to the Federal Emergency Relief Administration from appropriations heretofore made available to such Federal Emergency Administration of Public Works (which restoration is hereby authorized), this appropriation shall be available for the following classes of projects, and the amounts to be used for each class shall not, except as hereinafter provided, exceed the respective amounts stated, namely: (a) Highways, roads, streets, and grade-crossing elimination, $800,000,000; (b) rural rehabilitation and relief in stricken agricultural areas, and water conservation, trans-mountain water diversion and irrigation and reclamation, $500,000,000; (c) rural electrification, $100,000,000; (d) housing, $450,000,000; (e) assistance for educational, professional and clerical persons, $300,000,000; (f) Civilian Conservation Corps, $600,000,000; (g) loans or grants, or both, for projects of States, Territories, Possessions, including subdivisions and agencies thereof, municipalities, and the District of Columbia, and self-liquidating projects of public bodies thereof, where, in the determination of the President, not less than twenty-five per centum of the loan or the grant, or the aggregate thereof, is to be expended for work under each particular project, $900,000,000; (h) sanitation, prevention of soil erosion, prevention of stream pollution, sea coast erosion, reforestation, forestation, flood control, rivers and harbors and miscellaneous projects, $350,000,000; *Provided further*, That not to exceed 20 per centum of the amount herein appropriated may be used by the President to increase any one or more of the foregoing limitations if he

finds it necessary to do so in order to effectuate the purpose of this joint resolution; *Provided, further,* That no part of the appropriation made by this joint resolution shall be expended for munitions, warships, or military or naval material; but this proviso shall not be construed to prevent the use of such appropriation for new buildings, reconstruction of buildings and other improvements in military or naval reservations, posts, forts, camps, cemeteries, or fortified areas, or for projects for nonmilitary or nonnaval purposes in such places.

Except as hereinafter provided, all sums allocated from the appropriation made herein for the construction of public highways and other related projects (except within or adjacent to national forests, national parks, national parkways, or other Federal reservations) shall be apportioned by the Secretary of Agriculture in the manner provided by section 204 (b) of the National Industrial Recovery Act for expenditure by the State highway departments under the provisions of the Federal Highway Act of November 9, 1921, as amended and supplemented, and subject to the provisions of section 1 of the Act of June 18, 1934 (48 Stat. 993); *Provided,* That any amounts allocated from the apppropriation made herein for the elimination of existing hazards to life at railroad grade crossings, including the separation or protection of grades at crossings, the reconstruction of existing railroad grade crossing stuctures, and the relocation of highways to eliminate grade crossings, shall be apportioned by the Secretary of Agriculture to the several States (including the Territory of Hawaii and the District of Columbia), one-half on population as shown by the latest decennial census, one-fourth on the mileage of the Federal-aid highway system as determined by the Secretary of Agriculture, and one-fourth on the railroad mileage as determined by the Interstate Commerce Commission, to be expended by the State highway department under the provisions of the Federal Highway Act of November 9, 1921, as amended and supplemented, and subject to the provisions of section 1 of such Act of June 18, 1934 (48 Stat. 993); but no part of the funds apportioned to any State or Territory under this joint resolution for public highways and grade crossings need be matched by the State or Territory; *And provided further,* That the President may also allot funds made available by

this joint resolution for the construction, repair, and improvement of public highways in Alaska, Puerto Rico, and the Virgin Islands, and money allocated under this joint resolution to relief agencies may be expended by such agencies for the construction and improvement of roads and streets; *Provided, however,* That the expenditure of funds from the appropriation made herein for the construction of public highways and other related projects shall be subject to such rules and regulations as the President may prescribe for carrying out this paragraph and preference in the employment of labor shall be given (except in executive, administrative, supervisory, and highly skilled positions) to persons receiving relief, where they are qualified, and the President is hereby authorized to predetermine for each State the hours of work and the rates of wages to be paid to skilled, intermediate, and unskilled labor engaged in such construction therein: *Provided further,* That rivers and harbors projects, reclamation projects (except the drilling of wells, development of springs and subsurface waters), and public buildings projects undertaken pursuant to the provisions of this joint resolution shall be carried out under the direction of the respective permanent Government departments or agencies now having jurisdiction of similar projects.

Funds made available by this joint resolution may be used, in the discretion of the President, for the purpose of making loans to finance, in whole or in part, the purchase of farm lands and necessary equipment by farmers, farm tenants, croppers, or farm laborers. Such loans shall be made on such terms as the President shall prescribe and shall be repaid in equal annual installments, or in such other manner as the President may determine.

Funds made available by this joint resolution may be used, in the discretion of the President for the administration of the Agricultural Adjustment Act, as amended, during the period of twelve months after the effective date of this joint resolution.

SEC. 2. The appropriation made herein shall be available for use only in the United States and its Territories and possessions. The provisions of the Act of February 15, 1934 (48 Stat. 351), relating to disability or death compensation and benefits shall apply to those persons receiving from the appropriation made herein, for services rendered

as employees of the United States, security payments in accordance with schedules established by the President; *Provided*, That so much of the sum herein appropriated as the United States Employes' Compensation Commission, with the approval of the President, estimates and certifies to the Secretary of the Treasury will be necessary for the payment of such compensation and administrative expenses shall be set aside in a special fund to be administered by the Commission for such purposes; and after June 30, 1936, such special fund shall be available for these purposes annually in such amounts as may be specified therefor in the annual appropriation Acts. The provisions of section 3709 of the Revised Statutes (U. S. C., title 41, sec. 5) shall not apply to any purchase made or service procured in carrying out the provisions of this joint resolution when the aggregate amount involved is less than $300.

SEC. 3. In carrying out the provisions of this joint resolution the President may (a) authorize expenditures for contract stenographic reporting services; supplies and equipment; purchase and exchange of law books, books of reference, directories, periodicals, newspaper and press clippings; travel expenses, including the expense of attendance at meetings when specifically authorized; rental at the seat of government and elsewhere; purchase, operation, and maintenance of motor-propelled passenger-carrying vehicles; printing and binding; and such other expenses as he may determine necessary to the accomplishment of the objectives of this joint resolution; and (b) accept and utilize such voluntary and uncompensated services, appoint, without regard to the provisions of the civil-service laws, such officers and employees, and utilize such Federal officers and employees, and, with the consent of the State, such State and local officers and employees, as may be necessary, prescribe their authorities, duties, responsibilities, and tenure, and, without regard to the Classification Act of 1923, as amended, fix the compensation of any officers and employees so appointed.

Any administrator or other officer, or the members of any central board, or other agency, named to have general supervision at the seat of Government over the program and work contemplated under the appropriation made in section 1 of this joint resolution and receiving a salary of $5,000 or more per annum from such appropriation, and

any State or regional administrator receiving a salary of $5,000 or more per annum from such appropriations (except persons now serving as such under other law), shall be appointed by the President, by and with the advice and consent of the Senate; *Provided,* That the provisions of section 1761 of the Revised Statutes shall not apply to any such appointee and the salary of any person so appointed shall not be increased for a period of six months after confirmation.

SEC. 4. In carrying out the provisions of this joint resolution the President is authorized to establish and prescribe the duties and functions of necessary agencies within the Government.

SEC. 5. In carrying out the provisions of this joint resolution the President is authorized (within the limits of the appropriation made in section 1) to acquire, by purchase or by the power of eminent domain, any real property or any interest therein, and improve, develop, grant, sell, lease (with or without the privilege of purchasing), or otherwise dispose of any such property or interest therein.

SEC. 6. The President is authorized to prescribe such rules and regulations as may be necessary to carry out this joint resolution, and any willful violation of any such rule or regulation shall be punishable by fine of not to exceed $1,000.

SEC. 7. The President shall require to be paid such rates of pay for all persons engaged upon any project financed in whole or in part, through loans or otherwise, by funds appropriated by this joint resolution, as will in the discretion of the President accomplish the purposes of this joint resolution, and not affect adversely or otherwise tend to decrease the going rates of wages paid for work of a similar nature.

The President may fix different rates of wages for various types of work on any project which rates need not be uniform throughout the United States; *Provided, however,* That whenever permanent buildings for the use of any department of the Government of the United States, or the District of Columbia, are to be constructed by funds appropriated by this joint resolution the provisions of the Act of March 3, 1931 (U. S. C., Supp. VII, Title 40, sec. 276a), shall apply but the rates of wages shall be determined in advance of any bidding thereon.

SEC. 8. Wherever practicable in the carrying out of the provisions of this joint resolution, full advantage shall be taken of the facilities of private enterprise.

SEC. 9. Any person who knowingly and with intent to defraud the United States makes any false statement in connection with any application for any project, employment, or relief aid under the provisions of this joint resolution, or diverts, or attempts to divert, or assists in diverting for the benefit of any person or persons not entitled thereto, any moneys appropriated by this joint resolution, or any services or real or personal property acquired thereunder, or who knowingly, by means of any fraud, force, threat, intimidation, or boycott, deprives any person of any of the benefits to which he may be entitled under the provisions of this joint resolution, or attempts so to do, or assists in so doing, shall be deemed guilty of a misdemeanor and shall be fined not more than $2,000 or imprisoned not more than one year, or both.

SEC. 10. Until June 30, 1936, or such earlier date as the President by proclamation may fix, the Federal Emergency Relief Act of 1933, as amended, is continued in full force and effect.

SEC. 11. No part of the funds herein appropriated shall be expended for the administrative expenses of any department, bureau, board, commission, or independent agency of the Government if such administrative expenses are ordinarily financed from annual appropriations, unless additional work is imposed thereupon by reason of this joint resolution.

SEC. 12. The Federal Emergency Administration of Public Works established under title II of the National Industrial Recovery Act is hereby continued until June 30, 1937, and is authorized to perform such of its functions under said Act and such functions under this joint resolution as may be authorized by the President. All sums appropriated to carry out the purposes of said Act shall be available until June 30, 1937. The President is authorized to sell any securities acquired under said Act or under this joint resolution and all moneys realized from such sales shall be available to the President, in addition to the sums heretofore appropriated under this joint resolution, for the making of further loans under said Act or under this joint resolution.

SEC. 13. (a) The acquisition of articles, materials, and supplies for the public use, with funds appropriated by this joint resolution, shall be subject to the provisions of section 2 of title III of the Treasury and Post Office Appropriation Act, fiscal year 1934; and all contracts let pursuant to the provisions of this joint resolution shall be subject to the provisions of section 3 of title III of such Act.

(b) Any allocation, grant, or other distribution of funds for any project, Federal or non-Federal, from the appropriation made by this joint resolution, shall contain stipulations which will provide for the application of title III of such Act to the acquisition of articles, materials and supplies for use in carrying out such project.

SEC. 14. The authority of the President under the provisions of the Act entitled "An Act for the relief of unemployment through the performance of useful public work, and for other purposes", approved March 31, 1933, as amended, is hereby continued to and including March 31, 1937.

SEC. 15. A report of the operations under this joint resolution shall be submitted to Congress before the 10th day of January in each of the next three regular sessions of Congress, which report shall include a statement of the expenditures made and obligations incurred, by classes and amounts.

SEC. 16. This joint resolution may be cited as the "Emergency Relief Appropriation Act of 1935."

Approved, April 8, 1935, 4 p. m.

V.

EXECUTIVE ORDER OF THE PRESIDENT, JUNE 7, 1935

AUTHORIZING THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS TO CONTINUE TO PERFORM FUNCTIONS UNDER TITLE II OF THE NATIONAL INDUSTRIAL RECOVERY ACT AND TO PERFORM FUNCTIONS UNDER THE EMERGENCY RELIEF APPROPRIATION ACT OF 1935.

Pursuant to the authority vested in me by the Emergency Relief Appropriation Act of 1935, approved April 8, 1935 (Public Resolution No. 11, 74th Congress), I hereby authorize the Federal Emergency Administration

of Public Works, under the Federal Emergency Administrator of Public Works;

(a) to continue after June 16, 1935, to perform all of the functions which it was authorized to perform prior to June 16, 1935, under Title II of the National Industrial Recovery Act, approved June 16, 1933 (48 Stat. 200);

(b) subject to the rules and regulations heretofore and hereafter prescribed by the President to carry out the Emergency Relief Appropriation Act of 1935, approved April 8, 1935, to perform the following functions under said Act:

(1) make loans or grants, or both, for projects of states, territories, possessions, including subdivisions and agencies thereof, municipalities and the District of Columbia, and self-liquidating projects of public bodies thereof, where, in the determination of the President, not less than twenty-five per centum of the loan or the grant, or the aggregate thereof, is to be expended for work under each particular project;

(2) carry out projects for slum-clearance or low-cost housing, or both;

(c) to sell any securities acquired under Title II of the National Industrial Recovery Act, approved June 16, 1933, or under the Emergency Relief Appropriation Act of 1935, approved April 8, 1935, and all moneys realized from such sales shall be available for the making of further loans under the said Title II of the National Industrial Recovery Act or the said Emergency Relief Appropriation Act of 1935, in the performance of the functions herein authorized.

To the extent necessary to carry out the provisions of this Executive Order, the Administrator is authorized to acquire, by purchase or by the power of eminent domain, any real property or any interest therein, and improve, develop, grant, sell, lease (with or without the privilege of purchasing), or otherwise dispose of any such property or interest therein.

* * * *

The unobligated balances on June 30, 1935, of allotments of funds made pursuant to Title II of the National Indus-

trial Recovery Act, approved June 16, 1933, to departments and agencies of the Government which continue to exist after June 16, 1935, for the performance of functions of the Federal Emergency Administration of Public Works, are hereby reallocated for use by said departments and agencies, respectively, after June 30, 1935, for the purposes for which originally allocated thereto: Provided That upon completion of the project or work any unexpended balances of the aforesaid reallocations shall be reported by the departments or agencies concerned to the Secretary of the Treasury who will cause such balances to be placed to the credit of the appropriations from which said allotments were made.

FRANKLIN D. ROOSEVELT.

The White House
June 7, 1935

VI.

EXECUTIVE ORDER OF THE PRESIDENT, SEPT. 21, 1935

INCREASING THE LIMITATION CONTAINED IN CLAUSE (G) OF SECTION 1 OF THE EMERGENCY RELIEF APPROPRIATION ACT of 1935.

WHEREAS I find it necessary, in order to effectuate the purposes of the Emergency Relief Appropriation Act of 1935 (Public Resolution No. 11, 7th Congress), to increase by $800,000,000 the limitation of $900,000,000, contained in clause (g) of section 1 of the said Act, on the amount which may be expended under the Act for loans or grants, or both, for projects of States, Territories, Possessions, including subdivisions and agencies thereof, municipalities, and the District of Columbia and self-liquidating projects of public bodies thereof:

NOW, THEREFORE, by virtue of and pursuant to the authority vested in me under the said Emergency Relief Appropriation Act of 1935, it is ordered that the said limitation be, and it is hereby, increased from $900,000,000 to $1,700,000,000.

FRANKLIN D. ROOSEVELT

The White House,
September 21, 1935.